



SALIM SAID Alias

MAJID.....1ST APPELLANT

**AMOS ZIRO.....2ND
APPELLANT**

**GIDEON RAGIRA ANGIMA.....3RD
APPELLANT**

=VERSUS=

**REPUBLIC.....RESPO
NDENT**

JUDGEMENT

The three Appellants namely **SALIM SAID alias MAJID** (hereinafter referred to as the 1st Appellant), **AMOS ZIRO** (hereinafter referred to as the 2nd Appellant) and **GIDEON RAGIRA ANGIMA** (hereinafter referred to as the 3rd Appellant) have jointly filed this appeal challenging their conviction and sentence by the learned Senior Resident Magistrate sitting at Mombasa Law courts. The three appellants together with a fourth suspect namely **HARRISON KUTWA** (the 2nd accused in the trial) were all arraigned in court on 2nd September 2008 and were charged as follows –

COUNT NO. 1

“CONSPIRACY TO DEFRAUD CONTRARY TO SECTION 317 OF THE PENAL CODE”

Particulars were that

“On the 29th day of August 2008 at General Post Office Mombasa in Mombasa District within Coast Province, jointly with others not before court conspired with intent to defraud one FAMAU NGAO Kshs.1,100,000/- by falsely pretending that you were carrying out a genuine business of selling a house on plot No. 774 situated at Kisauni Barsheba”

COUNT NO. 2

“OBTAINING MONEY BY FALSE PRETENCES CONTRARY TO SECTION 313 OF THE PENAL CODE

Particulars of the offence were that:

“On the 29th day of August 2008 at General Post Office Mombasa District within Coast Province jointly with others not before court with intent to defraud obtained from FAMAU NGAO Kshs.1,100,000/- by falsely pretending that you were in a position to sell him a house on Plot No. 774 at Kisauni Barsheba a fact you knew to be false”

Count Nos. 3, 4, 5 and 6 related **only** to the 1st Appellant and were given together with particulars as follows:

COUNT NO. 3

“HAVING A DOCUMENT WITHOUT AUTHORITY CONTRARY TO SECTION 357(a) OF THE PENAL CODE”

“On or around the 29th day of August 2008 at unknown place in Mombasa District within Coast Province with intent to defraud and without lawful authority or excuse made a certain document namely National Identity Card No. 204712613 purporting it to be a genuine card issued by the Registrar of Persons”

COUNT NO. 4

UTTERING A DOCUMENT WITH INTENT TO DEFRAUD CONTRARY TO SECTION 357(b) OF THE PENAL CODE.

“On the 29th day of August 2008 at General Post Office Mombasa in Mombasa District within Coast Province with intent to deceive or defraud, knowingly uttered a certain document namely National Identity Card No. 204712613 to FAMAU NGAO which had been made without lawful authority .

COUNT NO. 5

MAKING A DOCUMENT WITHOUT AUTHORITY CONTRARY TO SECTION 357(a) OF THE PENAL CODE

“On or around 29th day of August 2008 at unknown place in Mombasa District within Coast Province with intent to defraud and without lawful authority or excuse made a certain document namely House Plan for Plot No. 774 at KISAUNI BARSHEEBA purporting it to be genuine house plan from [the] Municipal Council of Mombasa”

COUNT NO. 6

UTTERING A DOCUMENT WITH INTENT TO DEFRAUD CONTRARY TO SECTION 357(b) OF THE PENAL CODE

“On the 29th day of August 2008 at General Post office Mombasa in Mombasa District within the Coast Province with intent to deceive or defraud knowingly uttered a certain document namely House Plan for Plot No. 774 at KISAUNI BARSHEBA to Famau Ngao which had been made without lawful authority”

Finally the last charge being Count No. 7 related only to the 1st and 3rd Appellants. This last charge reads as follows:

COUNT NO. 7

PROCURING EXECUTION OF [A] DOCUMENT BY FALSE PRETENCES CONTRARY TO SECTION 355 OF THE PENAL CODE

“On the 29th day of august 2008 at General Post Office Mombasa in Mombasa District within Coast Province, by means of false and fraudulent representation as to the sale of a house on Plot No. 774 at Kisauni Barsheba you procured one Famau Ngao to sign a Sale Agreement document between Said Salim Alias Majid Rashid and Famau Ngao”

The Appellants all entered pleas of '**Not Guilty**' to the charges which they faced and their trial commenced before the lower court on 22nd December 2008. The prosecution led by **CHIEF INSPECTOR BAHATI** called a total of eight [8] witnesses in support of their case.

The brief facts of the case as narrated by the complainant **FAMAU NGAO** was that sometime in August 2008 he was looking for a house to purchase. He met an agent called **PANGA** who told him that he had been shown a house for sale by an agent known as **AMOS ZIRO** (the 2nd Appellant). Together the complainant and this man panga went to see the house in question. The complainant liked the house and asked to meet with the owner. They met at Hongera bar with the 1st Appellant who represented himself as the owner of the house. The 1st Appellant initially asked for a sum of Kshs.1.2 million but after bargaining he accepted to be paid Kshs.1.1 million. The next day they all went to the offices of Omari and Company Advocates in order to seal the deal. In that office they met the Advocate who was the 3rd Appellant. The 3rd appellant showed the complainant a Sale Agreement **Pexb1**, Deed Plan **Pexb2** and the 1st Appellant showed his identity card No. 204712613 in the names **MAJID RASHID ALI**. Since the complainant did not have cash on him that day it was agreed that they meet on 29th August 2008 to complete the transaction.

On 29th August 2008 the Sale Agreement was signed and the complainant paid to the 1st Appellant cash of Kshs.1.1 million. Thereafter the complainant went to inspect his new acquisition. He met one of the tenants who informed him that the genuine owner of the house was nearby. Realizing that he had been conned the complainant went and introduced himself to **PW4 MAJID MANFORD ABEID** who was the genuine owner of the house. **PW4** said that he had not sold his house neither had he asked any agent to help him identify a buyer for the same. The matter was reported to police after which the Appellants were all arrested and charged.

At the close of the prosecution case all the three (3) Appellants were ruled to have a case to answer and were placed onto their defence. They each gave statements denying all the charges. On 18th July 2011 the learned trial magistrate delivered his judgment in which he convicted the Appellants and sentenced each to serve two (2) years imprisonment on each count. The 1st Appellant was however sentenced to serve four (4) years imprisonment on each count. Being aggrieved the Appellants filed this present appeal. **MR. OMARI** Advocate argued the appeal on behalf of the 3rd Appellant whilst the 1st and 2nd Appellants appeared in person. **MR. JAMI** who appeared for the Respondent State opposed the appeal.

Having carefully perused the record of the trial as well as the written submissions on record I feel it is important to deal first with the curious position of the conviction and sentence of the 2nd Appellant. This 2nd Appellant **AMOS ZIRO** was actually the 3rd accused in the trial before the lower court. The record of the trial indicates that the 2nd Appellant absconded during the trial and was only eventually re-arrested **after** the prosecution had closed their case. At this point I feel it is necessary to give a step by step account of the proceedings in relation to the 2nd Appellant.

On 1st April 2009 **after** one witness had testified the prosecutor applied to consolidate the charges to include the 2nd Appellant. At page 19 line 11 the prosecutor said:

“PROSECUTOR

I wish to consolidate the case with Cr C 469/2009 R –VS- AMOS ZIRO. Amos was arrested later when this case had taken off but it will be time saving to have the two cases consolidated”

This application was allowed by the trial court hence consolidation was done and at page 20 line 10 the court indicated:

“COURT

Consolidated charge sheet admitted in court read out to the three persons in Kiswahili language and each accused respond ...”

So far so good. The charges having been duly read out all 3 accused persons entered a plea of ‘**Not guilty**’ to the charge and the case was set down for hearing. On 25th May 2009 [see page 27 of typed proceedings] one ‘**Dilali Mwachiro Albert**’ appeared and applied to stand as surety for the 2nd Appellant ‘**AMOS ZIRO**’. This surety was approved and the 2nd Appellant was released from custody on bond. After his release the 2nd Appellant did not return to court during the dates allocated for hearing and on 8th April 2010 [see page 33] the trial court issued a warrant of arrest as against the 2nd Appellant.

On 27th May 2010 the hearing did proceed and the evidence of **PW1** was recorded in the absence of the 2nd Appellant. At page 35 line 9 the coram of that date indicates that the 1st, 2nd and 4th accuseds were all present. **MR. OMARI** Advocate was on record for the 2nd, 3rd and 4th accuseds. The trial magistrate decided at page 35 line 11:

“CT: Matter to proceed as if 3rd accused person is present”

This was highly irregular and unprocedural. The rules of a fair trial dictate that an accused person **must** be present **in person** during his trial. There is no provision in law that allows a court to proceed “**as if**” the accused was present. Even if Mr. Omari was the advocate on record for the 2nd Appellant the court cannot proceed in the absence of the accused himself. The accused has a constitutional right guaranteed by Article 50(2)(f) of the Constitution of Kenya to hear and confront his accusers in open court and his presence would have been essential if only to enable him to give his lawyer the necessary instructions as the trial proceeded. There is no legal provision allowing a court to substitute a lawyer for an accused person. The proper course of action would have been for the prosecution to withdraw the charges as against the missing suspect and proceed with the case against the accuseds who were physically present. It is only when and if this 3rd accused (the 2nd Appellant) was arrested and brought to court that the court would proceed with the trial against him.

The trial proceeded in the absence of the 2nd Appellant and all eight (8) prosecution witnesses gave evidence in his absence. The 2nd Appellant had no opportunity to hear their evidence and therefore was denied the opportunity to challenge that evidence by way of cross-examination. As such the trial court denied him one of the main tenets of a fair trial.

All through the trial efforts were continuing to trace this 2nd Appellant. His surety was summoned to court several times but he too was unable to bring this person to court. Indeed finally on 29th July 2010 by his ruling to be found at page 53 of the proceedings, the trial magistrate ruled that the surety had **failed** in his obligation to ensure the attendance of the 3rd accused person in court and ordered the said surety to forfeit a sum of Kshs.200,000/- to the court or in default to serve six (6) months imprisonment.

Eventually on 20th January 2011 the prosecutor closed his case. The 1st, 2nd and 4th accuseds were all found to have a case to answer and were placed on their defence [the 3rd accused was still at large]. After submissions on no case to answer on 4th March 2011 the 3rd accused was finally brought to court under a warrant of arrest. His explanation for his long absence from court [page 71 of the proceedings] was rejected by the trial court and he was remanded into custody. Astonishingly the trial magistrate then proceeded to place the 3rd accused (who had not participated in the trial at all) onto his defence. At page 72 line 10 the trial magistrate says:

“Ct: Accused 3 has been placed on his defence on the basis that the matter proceeded as if he was present and on the strength of the evidence that has been adduced by the prosecution”

This ruling surely boggles the mind. How on earth can the 2nd Appellant be deemed to be answerable on the basis of evidence which he never heard? This is surely the height of injustice. The fact that the 2nd

Appellant absconded during the trial does not in any way mean that he is to be denied his rights to a fair trial. His action in absconding could be dealt with by way of appropriate sanctions. Indeed this was done by the trial magistrate revoking his right to bail. However it was the height of folly for the trial magistrate to proceed with the hearing in total disregard of the fact that evidence was taken in the absence of the 2nd Appellant. I am very surprised that the State Counsel did not notice this grave anomaly and did not bring it to the attention of the court. The trial court ought to have directed that since the prosecution had closed its case a re-trial be conducted (preferably by another court) of the 2nd Appellant alone. Putting him on his defence was fallacious, erroneous and had no legal basis at all. These actions of the trial magistrate render the proceedings in respect of the 2nd Appellant null and void ab initio – indeed it was an illegality and a mistrial. His conviction has no basis in law and cannot be allowed to stand. The 2nd Appellant was clearly denied a fair trial and this court will not compound that injustice by confirming his flawed conviction. I allow the appeal by the 2nd Appellant and I quash his conviction on Count No. 1 of the charge. The 2 year sentence imposed upon the 2nd Appellant is also set aside.

I have addressed my mind to the question of whether to order a re-trial for the 2nd Appellant. However I note that having been convicted in July 2011 the 2nd Appellant has now served more than half of his two year sentence. The error leading to his flawed conviction is to be blamed squarely on the prosecution and the trial court. I feel that it would be prejudicial to subject the 2nd Appellant to a new trial given the circumstances of his conviction. Therefore I allow his appeal in its entirety and I do hereby direct that the 2nd Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

I will now proceed to consider the appeal with respect to the 1st and 3rd Appellants. On the first charge of Conspiracy to Defraud **PW1** told the court that when he met the 1st Appellant, the 1st Appellant represented himself and indeed introduced himself to **PW1** as **'Majid Rashid Ali'** the owner of the house for sale. **PW3 JOHN PANGA DZIYA** the agent who took **PW1** to the house confirms that they met the 1st Appellant at the house and also confirms that the 1st Appellant told them that he was **'Majid'** the owner of the house.. **PW1** believing the 1st Appellant to be the true owner negotiated with him and they agreed on a sale price of Kshs.1.1 million. The 1st Appellant even showed **PW1** an identity card No. 204712613 in the names of Majid Rashid Ali to prove that he was the owner of the house. Believing everything to be above board **PW1** went ahead with the sale and as he told the court the 1st Appellant took him to the offices of Omari & company Advocates where the deal was to be sealed. There they met the 3rd Appellant who introduced himself as an advocate called **'Omari'**. The 3rd Appellant then removed a file containing a Sale Agreement and an approved plan from the Municipal council. The next day the complainant returned to the offices of the same advocate where he paid out a sum of Kshs.1.1 million to the 1st Appellant in cash and signed the sale Agreement a copy of which was produced as an exhibit **Pexb4**. Later the complainant came to learn that all he had been told was a lie. The house did not actually belong to the 1st Appellant. **PW6** told the court that he is **MAJID MANFORD ABEID** who is the true owner of the house in question. He stated that at no time did he ever put up his house for sale and he stated that he did not know the 1st Appellant or 3rd Appellants at all. He produces the sale and transfer agreements for his house on Plot No. 95 Section 2 **Pexb14(a)** and **Pexb14(b)**. **PW6** produces a copy of his genuine identity card No. 10578048.

The fact that the 1st Appellant was dishonest is further shown by the evidence of **PW4 JOSEPH MUNENE** a clerk with the Ministry of Immigration. He told the court that he made a check in their data bank of the identity card No. 204712613 and found that it was not genuine. This was the identity card which the 1st Appellant presented as his and which bore his photograph. Why would 1st appellant show to the complainant a forged identity card? Clearly his intentions were to con the complainant.

It is also very instructive that it was the 1st Appellant who led the complainant to the offices of the lawyer who was the 3rd Appellant. Upon arrival the 3rd Appellant already had a Sale Agreement ready and prepared as well as a plan for the house. How did the 3rd appellant know that these documents were required and where did he obtain them from? As it later transpired from the evidence of **PW7 MARK**

MUREITHI NJOGU a building inspector from the Municipal Council of Mombasa the plan which the 3rd Appellant had in his file was a forgery. It had not been prepared or registered by the Municipal Council of Mombasa. It is quite clear that the actions of the 1st and 3rd Appellants were in tandem and were orchestrated to fool the complainant. I have no doubt that the two had conspired. In his defence the 3rd Appellant stated that he only acted as an Advocate to facilitate a sale and denies having been involved in any conspiracy. As an advocate 3rd Appellant owed his client a duty of care. His client in this case was the complainant. Any advocate worth his salt would check and cross-check all documents involved in a sale and confirm their authenticity before presenting them to a client as genuine. The fact that the 3rd Appellant did not bother to do a basic check is in my view suspicious. It is even more suspicious that 3rd Appellant is found operating in an office belonging to another lawyer **MR. OMARI** and used the stamp which belonged to Omari & Company Advocate bearing Box No. 91122 Mombasa. **PW8 CORPORAL OUMA** the investigating officer told the court that upon checking with the Post Master Mombasa he discovered that Box No. 91122 actually was registered to one '**Catherine Anuna George**' and **not** to Omagwa Angima Advocates. This was a deal that stank to high heaven. The liberal use of false documents can only be proof of the fraudulent intentions of the 1st and 3rd Appellants. Even in their own evidence the two Appellants contradict each other. While the 1st Appellant in his defence denies having been involved in any sale of a house the 3rd Appellant concedes that he did prepare a Sale Agreement for the sale of a house worth Kshs.1.1 million between the 1st Appellant and another. They cannot both be telling the truth. I am convinced that both are lying to court. This was a cleverly thought out conspiracy between the two to fleece money from unsuspecting buyers using forged documents. I am satisfied that the charge of conspiracy has been proved and I do uphold the convictions of both the 1st and 3rd Appellants on the first count.

On Count No. 2 the 1st and 3rd Appellants were charged with **OBTAINING MONEY BY FALSE PRETENCES**. As I have demonstrated earlier the two acting in cahoots falsely misrepresented the complainant that there was a house for sale and that the 1st Appellant was the owner of that house. In so doing they persuaded the complainant to pay out cash of Kshs.1.1 million. The complainant's bank statement produced in court **Pexb23** is proof that the complainant withdrew this amount from his bank account on the material day. The complainant told the court that on 29th August 2008 he handed over the money to the 1st Appellant in the office in the presence of the 3rd Appellant. The incident occurred in broad daylight. The complainant had met both men the day before thus he knew them well. I find no possibility of a mistaken identity.

The fact that the 3rd Appellant benefitted from these illegally obtained funds is evident from the evidence of the investigating officer **PW8**. Acting on a court order he investigated the account of the 3rd Appellant which was Account No. 1100067783300 in the names Gideon Ragira Angima held at Co-operative Bank, Mumias Branch. On the very day the Sale Agreement was signed a deposit of Kshs.380,000/- was made into this account. The bank statement is produced as an exhibit **Pexb21**. I do not think it is a mere coincidence that the 3rd Appellant's account which previously had only Kshs.75/- is suddenly boosted by a deposit of kshs.380,000/- the very day when he and the 1st Appellant falsely obtain 1.1 million from the complainant. In his defence the 3rd Appellant called an advocate **JULIUS GICHANA DW5** who told the court that he paid the 3rd Appellant a sum of Kshs.200,000/- for referring client to him. However **DW5** produces no evidence of the existence this phantom client nor does he produce any document e.g. receipt or credit slip to show that he did infact pay this money to the 3rd Appellant. I am satisfied that the 1st and 3rd Appellants did acting in concert fraudulently obtained Kshs.1.1 million from the complainant. I find the conviction on count No. 2 of the charge to have been sound and I do uphold the same.

The 1st Appellant was convicted on each of Counts 3, 4, 5 and 6, which all related to the false documents which he had in his possession. On count No. 3 as I have discussed earlier the identity card No. 204712613 bearing the photograph of the 1st Appellant was proved by the evidence of **PW5** to have been a forgery. It was neither made nor issued by the Registrar of Persons. The names thereon were not the true names of the 1st Appellant whose true names were '**Salim Said**'. It is clear that this identity card was

made for the sole intention of perpetrating a fraud. I therefore uphold the conviction of the 1st Appellant on Count No. 3.

On Count No. 4 it is alleged that the 1st Appellant uttered or presented this forged identity card to the complainant all the while purporting it to be a genuine document. Once again this aspect has been covered in earlier parts of this judgment. The complainant testified that the 1st Appellant showed him the said identity card **Pexb4** as proof that he was the owner of the house for sale. This was the same identity card used by the 3rd Appellant to prepare the Sale Agreement **Pexb1**. **PW4** an officer from the Registrar of Persons confirms that the identity card was a forgery and produces his report to that effect **Pexb12**. More importantly **PW6** the genuine owner of the house told court that his own identity card is No. 10578048. Once again the complainant did positively identify the 1st Appellant as the man who showed him the forged identity card. I am satisfied that the offence of Uttering is proved and I uphold the conviction of the 1st Appellant on Count No. 4.

On count No. 5 the 1st Appellant is charged with Making a False document namely a House Plan for Plot No. 774 at KISAUNI BARSHEBA purporting it to be a genuine plan from the Municipal Council of Mombasa. This plan was produced as an exhibit in court **Pexb2**. The complainant told the court that the 1st Appellant showed him this plan at the lawyer's office. **PW7** the officer from the Municipal council of Mombasa told the court that the said plan was a forgery. It did not emanate from their offices and had not been registered by the council. **PW7** further stated that no such Plot 774 existed in their records. There can be no doubt that this plan **Pexb2** was a false document. However be that as it may the prosecution failed to adduce any evidence to show that it was the 1st Appellant who made (or drew) that false House Plan. No evidence was called from a document-examiner and no evidence was adduced by any witness to the effect that they saw the 1st Appellant make (or draw) this false house plan. As such I find that this charge remained unproven and I quash the conviction of the 1st Appellant on Count No. 5. His four (4) year sentence for that charge is also set aside.

On Count No. 6 the 1st Appellant is charged with Uttering the False House Plan to the complainant. As stated earlier this fact was testified to by the complainant himself. Since he was not the owner of the house in question the 1st Appellant undoubtedly knew that this was a false document. With such knowledge he proceeded to utter the same to the complainant and present it as genuine. I am satisfied that the charge of Uttering is proved and I do uphold the conviction of the 1st Appellant on Count No. 6.

Finally on Count No. 7 both the 1st and the 3rd Appellants are charged with ***'Procuring execution of a Document by False Pretence contrary to Section 355 of the Penal Code'***. The false document referred to in this charge is the Sale Agreement signed between the 1st Appellant as the seller and the complainant as the buyer. This Sale Agreement was exhibited before the court as **Pexb1**. S. 355 of the Penal Code provides:

“Any person who, by means of any false and fraudulent representations as to the nature, contents or operation of a document or electronic record, procures another to sign or execute the document or electronic record, is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the document or electronic record”

This section provides that the false and fraudulent representation must relate to the nature, **contents** or operation of the document in question. In this case it is quite evident that the contents of the Sale Agreement were false. Both 1st and 3rd Appellants made false representations to the complainant regarding the content of that Sale Agreement. The 1st Appellant falsely misrepresented himself as the owner of the house and endorsed on the agreement a false identity card number. On his part the 3rd Appellant falsely misrepresented that the house genuinely belonged to his client [the 1st Appellant] and falsely pretended that the house plan cited in the agreement was genuine. It was on the basis of all these false misrepresentations that the complainant signed the Sale Agreement. The offence provided for by Section 355 has clearly been proved thus I do uphold the conviction of both 1st and 3rd Appellants on

Count No. 7.

For clarity the findings of this court with respect to the Appellant's appeals are as follows:

1st Appellant

Convictions upheld on count Nos. 1, 2, 3, 4, and 6. Conviction quashed on Count No. 5

2nd Appellant

Conviction on all counts is quashed.

3rd Appellant

Convictions upheld on Count Nos. 1, 2, and 7

The 1st and 3rd Appellants were both allowed an opportunity to mitigate. They were thereafter sentenced to terms of four (4) years imprisonment for the 1st Appellant and two (2) years imprisonment for the 3rd Appellant. In my view given the magnitude of the offence and the large sum of money obtained from the complainant I find that the sentences imposed were both lawful and appropriate. I therefore confirm the sentences as follows:

1st Appellant

Two (2) year sentences on Counts 1, 2 and 7 are upheld. Four (4) year sentence for Count Nos. 3, 4 and 6 are upheld.

3rd Appellant

Two (2) year sentences on Count Nos. 1, 2 and 7 are hereby upheld.

The prison terms for the 1st Appellant shall run concurrently from the date of conviction in the lower court. With respect to the 3rd Appellant since he was out on bond pending this appeal his term of imprisonment shall be served concurrently from the date of this judgement.

It is so ordered.

Dated and Delivered in Mombasa this 14th day of August 2012.

M. ODERO
JUDGE

In the presence of:

Mr. Angima holding brief for Mr. Omari for 3rd Appellant

Mr. Gioche for State